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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-429

SIGMA SYSTEMS CORPORATION,
APPLIED SCIENCE INCORPORATED,
C. L. HABERN AND R. E. MORGAN,
Petitioners,

v.

ELECTRONIC DATA SYSTEMS CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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APPLIED SCIENCE INCORPORATED,
C. L. HABERN AND R. E. MORGAN,
Petitioners,

v.

ELECTRONIC DATA SYSTEMS CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, Sigma Systems Corporation, Applied Science Incorporated, C. L. Habern and R. E. Morgan, respectfully pray that a writ of certiorari issue to review the judgment entered on August 30, 1974, by the United States Court of Appeals for the Fifth Circuit in its cause No. 73-1676.

OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals is reported at ..... F.2d ..... (5th Cir. 1974), and is reprinted in the Appendix to this petition at page A-1. The Memorandum Opinion of the District Court for the Northern District of Texas was not reported, but it and the Judgment are included in the Appendix at page A-11 and A-17.

JURISDICTION

The judgment of the Court of Appeals was entered on August 30, 1974, and this petition is filed within ninety days of that date. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1970).

QUESTIONS PRESENTED

I. Whether, in a private antitrust action, the district and appellate courts can reject the jury's determination of a causal relationship between a contract containing a covenant not to compete which was found by the jury to be in unreasonable restraint of interstate trade or commerce, and the subsequent economic demise of the company which was unwillingly compelled to accept such contract, where there was substantial evidence supporting the inference that threats of suit based upon the contract, followed by suits in both state and federal court materially contributed to such demise.

II. Whether, in a private antitrust action, the district and appellate courts can reject the jury's determination of the amount of damages suffered by the antitrust claimant as the result of an unreasonable covenant not to compete, where there was substantial evidence supporting such determination in the form of market analyses and projections of the profits to be realized from the marketing activities unlawfully foreclosed to the claimant.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The United States Constitution:

Amendment VII (1791).

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by

jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law."

Sherman Act § 1:

15 U.S.C. § 1 (1970).

"Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal. . . ."

Clayton Act § 4:

15 U.S.C. § 15 (1970).

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

STATEMENT OF THE CASE

This action was brought by Respondent, Electronic Data Systems Corporation (EDS) against Petitioners, Sigma Systems Corporation (Sigma), Applied Science Incorporated (Applied), C. L. Habern (Habern) and R. E. Morgan (Morgan), on September 18, 1970. Habern and Morgan were officers and employees of Sigma, and each had contracted with EDS as an individual. Applied, through its sales division, Applied Science Associates, was Sigma's sales representative. Plaintiff's suit was for patent infringement and related acts of unfair competition based upon asserted breaches of certain agreements, jurisdiction being founded on Sections 1338(a) and 1338(b) of Title 28, United States

Code. Defendants counterclaimed for violation of Section 1 of the Sherman Act, pursuant to Section 4 of the Clayton Act. 15 U.S.C. §§ 1, 15 (1970).

The controversy arose as a result of an arrangement between EDS and Sigma, whereby the latter was to design and build a limited number of production prototypes of a computer terminal device, based upon certain design specifications supplied by EDS. In general terms, such device was a member of the family of computer terminals which permits computer access from remote locations by means of a conventional telephone system. In the contracts between the parties which the jury found to have been executed by Petitioners under duress or economic coercion, Respondent included two restrictive provisions relating to competitive activities. The first provision prohibited competition with EDS by constructing or participating in the construction of an alphanumeric data input terminal and the second provision prohibited competition with EDS by entering the computer services business. These provisions were the principal bases for Petitioners' counterclaim under Section 1 of the Sherman Act.

Several months after the completion and delivery of the production prototype units, Sigma designed and began to market a computer terminal device (*not* alphanumeric in character), whereupon EDS threatened and subsequently filed two suits, the first of which was in state court and resulted in the entry of a temporary injunction (later vacated), and the second of which was the present action. The temporary injunction in the state court action, which remained in effect for several months, prohibited Petitioners from constructing and marketing any device capable of use as a computer terminal by means of the telephone system. During the period of this injunction, Sigma and Applied went out of business and Habern and Morgan were

forced to find other employment. There were no proceedings in the state court action after the injunction was vacated.

After two weeks of trial, all issues were submitted to the jury by thirty-six special interrogatories. With respect to the antitrust counterclaim, the jury found that the covenant respecting alphanumeric terminals was not unreasonable, but that Petitioners had not violated it. As to the covenant which prohibited entry into the computer services business, the jury found that it imposed a greater restraint upon interstate trade or commerce than was reasonably necessary to protect EDS, that it caused economic injury to the business or property of Petitioners, and that Petitioners had such business or property as to entitle them to maintain a claim under the antitrust laws based on such provision. At the same time, the jury found that Petitioners did not have such business or property as to entitle them to maintain a claim under the antitrust laws based upon the covenant not to construct an alphanumeric terminal, thus holding, in effect, that the business of Petitioners was in the area of computer services and did not involve alphanumeric terminals. The jury fixed Petitioners' damages at $410,000.

The jury found that no claims of the EDS patent were infringed, and that the subject matter of the broader claims first was invented by another and not the patentee. Respondent's claim of unfair competition resulted in a jury determination that Petitioners had used and disclosed information communicated to them under the terms of the written agreements, but that such information already was publicly known at the time they received it. Some other information obtained from Respondent which was not publicly known was found to have been disclosed (although not used) by Petitioners, to Respondent's damage in the amount of 250 dollars. (App. A-14)

Petitioners subsequently moved for judgment on the verdict, and Respondent moved for judgment notwithstanding the verdict. With respect to the antitrust counterclaim, the District Court denied relief to Petitioners on the basis that "the findings of the jury that the Defendants had standing to bring this antitrust claim (Question 36) and suffered injury and damages to their business or property by reason of the agreement not to enter the computer services business (Questions 34b and 35) are not supported by substantial evidence." (App. A-15)

The action for patent infringement was dismissed as a result of the jury's finding of noninfringement. Damages were awarded to Respondent in accordance with the jury's finding that Petitioners had disclosed certain information, but there was no basis in the verdict for restricting Petitioners' right to market their computer terminal and no injunction was entered. (App. A-12)

The Appellate Court, in a relatively brief decision, summarized its holding in the statement that "the only rational conclusion that can be justified by the record of this case below is that the trial court should in all respects be affirmed." (App. A-7) As to the antitrust counterclaim, it was said, "This court's examination and analysis of the evidence causes us to conclude that the trial court was well within its discretion and used sound judgment in making such a ruling."[1] (App. A-10)

Neither court alluded in any manner to the substantial evidence tending to establish a direct causal relationship

[1] The cursory nature of the Appellate Court's review is illustrated by its statement that the Trial Court found substantial evidence to support the jury finding that Sigma had standing to bring an antitrust claim. (App. A-10) In its Memorandum Opinion, the Trial Court expressly stated a contrary conclusion. (App. A-15)

between the unreasonable covenant in restraint of trade and the economic demise of Sigma and Applied, with the consequent loss of position and income by Habern and Morgan. Likewise, neither court discussed or advanced any justification for ignoring the evidence from which the jury could have and did find damages to Petitioners in the amount of $410,000. As a consequence, the basis for the judgment cannot be ascertained from either opinion.

REASONS FOR GRANTING THE WRIT

I. This Case Presents Common, Significant and Undecided Issues Under the Federal Antitrust Laws.

The relationship between covenants not to compete and Section 1 of the Sherman Act urgently requires attention by this Court. Although such covenants regularly and routinely are utilized by companies having sufficient bargaining power to impose them upon employees, consultants and contractors, and although such covenants undeniably restrain trade, the matter has received almost no judicial attention. As a consequence, there is a real and continuing practice of fashioning unreasonably broad restraints on competitive activities in reliance on apparent immunity from the antitrust laws.

This potential for antitrust violations in the area of noncompetitive covenants has not escaped attention. For example, a spokesman for the Antitrust Division of the United States Department of Justice observed several years ago:

> "[W]e have been concerned about the taking of an overbroad covenant not to compete in connection with the purchase of a competitor. This heretofore has been an area which has been largely relegated to a subdivision of the laws of the several states on unfair competition. In our view, in particular contexts an overbroad covenant not to compete can itself rise to

> the dignity of an antitrust violation, and certainly may be an anticompetitive effect on which a Section 7 or Section 2 case might turn."[2]

This Court also has commented on such covenants in a Sherman Act Section 2 context, noting in *Schine Chain Theatres* v. *United States*, 334 U.S. 110, 119 (1948):

> "Even an otherwise lawful device may be used as a weapon in restraint of trade or in an effort to monopolize a part of trade or commerce. Agreements not to compete have at times been used for that unlawful purpose."

A more important problem, however, arises under Section 1 of the Sherman Act, even though there does not appear to have been a single reported decision which directly addressed the issue.

The situation is discussed at length in a recent article entitled *Antitrust's Neglected Stepchild: A Proposal for Dealing with Restrictive Covenants Under Federal Law.*[3] Here Professor Goldschmid of Columbia University School of Law observed that "[N]ational antitrust goals are being seriously compromised by unwise decisions made under the aegis of state law,"[4] and although he stated that it was "almost frivolous to deal with the question whether an unreasonably restrictive covenant may be treated as an actionable restraint under Section 1 of the Sherman Act," he cautioned that "the absence of direct authority, in an area where many disputes occur annually, compels some

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[2] Orrick, *The Antitrust Division's Enforcement Program*, 1965 ANTITRUST LAW SYMPOSIUM 31, 34. (N.Y. St. B. Ass'n 1965).

[3] Goldschmid, 73 COLUM. L. REV. 1193 (1973).

[4] *Id.* at 1193.

care."[5] Some years earlier Professor Blake of Harvard observed in his article entitled *Employee Agreements Not to Compete*:

> "[U]nreasonable post employment restraints would seem clearly to violate the Sherman Act, with the usual consequences, including possible action by the attorney general, and treble-damage liability to the injured party . . . . However, the Antitrust Division has in all likelihood never turned its attention to such agreements, and no treble-damage actions have been discovered among the reported thousands of cases."[6]

In the thousands of cases mentioned by Professor Blake, a common practice has been to review the restrictive covenant in light of the nature of the property right which it was designed to protect, and to grant such relief to the covenantee as the court deems reasonable. Although some portion of the covenant may be unenforceable, the party who created the overly broad restraint suffers no penalty except an inability to secure an injunction equal in breadth to the covenant. The reason for this refusal to deal with the antitrust aspects of the situation was expressed by Professor Goldschmid as follows:

> "Local judges, steeped in the intricacies of contract and real estate law, impressed with the respectability of those seeking to enforce restrictive covenants, and imbued with a sense that freedom of contract is a basic value that should almost invariably be upheld, have paid scant attention to the spirit of the antitrust laws or to original common law notions of restraint of trade."[7]

While this may be one reason for the lack of reported cases comparable to that presented in this Petition, there is

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[5] Goldschmid, 73 COLUM. L. REV. at 1204 (1973).

[6] 73 HARV. L. REV. 625, 628n.8 (1960).

[7] Goldschmid, 73 COLUM. L. REV. at 1204 (1973).

another factor of even greater significance. Although covenants not to compete are common, the covenantor rarely will be in position to maintain a private antitrust action.

The situation is made clear by considering the position of one who has been compelled to enter into an unreasonable agreement not to compete. If he complies with the obligation, he never will acquire any business or property which could be damaged by the covenant, and thus never could become a complainant under the antitrust laws. On the other hand, if he elects to challenge the covenant by entering an area which might be within the scope of the covenant, there can be no inference of injury to his business or property; a party hardly could be injured by the presence of a contractual provision which he has ignored. It follows that unless the party who exacted the unreasonable covenant interferes with the competitive activities of the covenantor, as by a threat of enforcement or some other action which succeeds in inhibiting such activities, there would be no injury. Thus, a noncompetitive covenant itself almost never is the source of injury of such a character as to permit a private antitrust action. The injury can occur only when the covenantor develops some business or property in an activity foreclosed by the covenant, and thereafter is injured in such business or property by the covenantee, acting in reliance on the unlawful agreement.

In the matter presented by this Petition, it should be noted at the outset that neither the District Court nor the Court of Appeals took advantage of the opportunity afforded by the present facts to supply the long overdue statement of fundamental law that one who unreasonably restrains trade by means of a covenant not to compete has violated Section 1 of the Sherman Act. Of even greater significance, however, was the disposition of the case on the issue of standing under Section 4 of the Clayton Act. In

denying relief to Petitioners, neither court discussed the evidence or suggested any bases for the conclusionary statement that there was no substantial evidence supporting the jury's determination of both the fact and amount of injury.

Petitioners urge that there is an immediate need for a definitive statement by this Court of the principles applicable to private antitrust actions based on unreasonable covenants not to compete. More specifically, for the present guidance of the lower courts and the future guidance of those who utilize such covenants in their business contracts, it should be stated:

(1) That a contract containing an unreasonable covenant not to compete violates Section 1 of the Sherman Act, and

(2) That the covenantor in such a circumstance has standing to maintain a private antitrust action if the facts fairly support the inference that threats followed by legal action based on such contract materially contributed to a business loss.

II. The Decisions Below Threaten the Effectiveness of the Private Remedy for Enforcing the Antitrust Laws.

In their disposition of Petitioners' antitrust counterclaim, the courts below have evidenced the same tendency to erode the effectiveness of Section 4 of the Clayton Act which prompted this Court to review certain questions in *Continental Ore Co.* v. *Union Carbide and Carbon Corp.*, 368 U.S. 886, *granting cert. to* 289 F.2d 86 (9th Cir. 1961). In *Continental Ore*, the jury held against the antitrust claimant, who then based its appeal on the exclusion of various evidentiary items, certain instructions to the jury, and other rulings of the trial court. On appeal, it was con-

cluded that even if the excluded evidence had been before the jury, there still would have been insufficient evidence to justify the jury's finding that the defendants' illegal acts were in fact the cause of Continental's injury, and that, hence, a directed verdict for defendants would have been proper in any event. This Court indicated that it had granted certiorari as to those issues "which required examination in the light of previous decisions of this Court and which presented important questions under the antitrust laws." *Continental Ore Co.* v. *Union Carbide and Carbon Corp.*, 370 U.S. 690, 696 (1962).

In writing for a unanimous court (excepting Mr. Justice Frankfurter, who took no part in the consideration or decision in the case), Mr. Justice White presented two propositions which are directly applicable to the present petition. First, he noted, "The Court of Appeals was, of course, bound to view the evidence in the light most favorable to Continental and to give it the benefit of all inferences which the evidence fairly supports, even though contrary inferences might reasonably be drawn." *Id.* He also quoted, with appropriate citation of authorities, the proposition that "where the plaintiff proves a loss, and a violation by defendant of the antitrust laws of such a nature as to be likely to cause that type of loss, there are cases which say that the jury, as the trier of the facts, must be permitted to draw from this circumstantial evidence the inference that the necessary causal relation exists." *Id.*

Where, as here, the parties who were the direct and unwilling subject of a contractual provision in unreasonable restraint of trade were driven into insolvency by circumstances which certainly included threats of suit and suits based on such contract, it hardly can be questioned that the purposes and policies of the Clayton Act clearly have been thwarted. If the judgments below are allowed

to stand, an undeniable violation of the antitrust laws will be unredressable by private action. Thus the present case presents a situation equal in importance to that of *Perma Life Mufflers* v. *International Parts Corp.*, 392 U.S. 134, 136 (1968), where certiorari was granted because "these rulings by the Court of Appeals seemed to threaten the effectiveness of the private action as a vital means for enforcing the antitrust policy of the United States, . . ."

III. Petitioners Were Denied Their Right to Jury Trial.

The courts below have failed to recognize the Constitutional principle of jury determination of disputed fact issues. This Court consistently has adhered to the principle that "maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Dimick* v. *Schiedt*, 293 U.S. 474, 486 (1935).

It repeatedly has granted petitions in cases where a lower court withheld a case from the jury or set aside the jury's verdict, most frequently but not always in cases arising under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (1970). The exceptions include a diversity action for personal injuries, *Gibson* v. *Phillips Petroleum Co.*, 352 U.S. 874 (1956), and on an insurance contract, *Dick* v. *New York Life Insurance Co.*, 359 U.S. 437 (1959). On one occasion, Mr. Justice Douglas observed that "the criterion governing the exercise of our discretion in granting or denying certiorari is not who loses below but whether the jury function in passing on disputed questions of fact and in drawing inferences from proven facts has been respected." *Wilkerson* v. *McCarthy*, 336 U.S. 53, 70-71 (1949). The District Court in the present case has failed to respect this important jury function.

In the present case, Petitioners were effectively deprived of their right to jury trial as a result of the erroneous assumption by the District Court that it was free to accept such jury findings which were in agreement with its view of the evidence, and to reject others. Petitioners urge that the case upon which the District Court relied, *Boeing* v. *Shipman*, 411 F.2d 365 (5th Cir. 1969), does not and cannot justify its acceptance of many of the jury's findings as fully supported by the evidence, and rejection of others which in fact were supported by the same evidence. The courts below thus failed to heed this Court's admonition that "where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way. For a search for one possible view of the case which will make the jury's findings inconsistent results in a collision with the Seventh Amendment." *Atlantic and Gulf Stevedores, Inc.* v. *Ellerman Lines, Ltd.*, 369 U.S. 355, 364 (1962).

CONCLUSION

This case offers a uniquely favorable opportunity for this Court to provide needed guidance to the business community, to present and potential litigants, and to the lower courts in an area of major national interest. Non-competitive covenants have enjoyed a surprising and unfortunate immunity under the antitrust laws, and an occasion to review the situation has been long in coming.

The facts of the case are quite simple. Petitioners were unwillingly compelled to agree not to compete with Respondent, and such agreement undeniably was unreasonable. Petitioners were denied relief on the basis that there was no substantial evidence to support either the fact or amount of damages, a determination which was directly

contrary to the jury's findings in both areas. Thus, what appears to be the first effort to secure relief under Section 4 of the Clayton Act for an unreasonable covenant not to compete has been frustrated by the imposition on Petitioners of an unsupportable and unjustifiable burden with respect to showing their injury.

The issues are believed to be long overdue for consideration by this Court. Surely one who has presented circumstantial evidence which would support the inference that he was driven out of business by general threats and litigation based upon a contract containing an unreasonable non-competitive covenant has done everything which normally could be done to establish a right to relief under the Clayton Act. By denying recovery to Petitioners on the basis of an insufficient causal connection between the unlawful covenant and the economic demise of the principal covenantor, the lower courts have shown the same reluctance to subject non-competitive covenants to antitrust scrutiny which has resulted in their untempered and widespread use by the business community. In concluding that Petitioners were driven out of business as a result of causes which included the unreasonable contract, the jury drew an inference which was amply justified by the evidence, and the denial of relief in accordance with the jury verdict both violates the Seventh Amendment and thwarts the private enforcement of the

antitrust laws. For the reasons aforesaid, it is respectfully submitted that the Court should grant Petitioners' prayer for a writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A

OPINION OF THE COURT OF APPEALS

ELECTRONIC DATA SYSTEMS CORPORATION,
Plaintiff-Appellant-Cross Appellee,

v.

SIGMA SYSTEMS CORPORATION, ET AL.,
Defendants-Appellees-Cross Appellants,

v.

CHANCELLOR INDUSTRIES, INC.,
Involuntary Plaintiff-Appellee.

No. 73-1676.

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.

AUG. 30, 1974.

Appeals from the United States District Court for the Northern District of Texas.

Before BROWN, Chief Judge, and AINSWORTH and MORGAN, Circuit Judges.

LEWIS R. MORGAN, Circuit Judge.

ACTION:

On September 18, 1970, Electronic Data Systems Corporation (E.D.S.) filed suit in the United States District Court for the Northern District of Texas against Sigma Systems Corporation (Sigma), and others.[1] E.D.S., seeking

[1] To avoid confusion and for the purpose of simplicity, the term "Sigma" applies to all the named defendants. Our review of this case does not demonstrate a need to consider any of the defendants separately.

injunctive relief and a damage award, claimed that Sigma had infringed on an E.D.S. patent, No. 3,515,806, and had breached a written nondisclosure agreement dated February 23, 1968, a written prototype noncompetition agreement dated May 28, 1968, and their confidential relationship with E.D.S.

Sigma, the defendant herein, counterclaimed alleging violations of the Sherman and Clayton Acts by E.D.S. in regard to the May 1968 noncompetition agreement. Trial by jury was requested. After presentation of testimony and evidence, 35 multipart interrogatories were submitted to the jury. The answers given by the jury were partially favorable to E.D.S. and partially favorable to Sigma. E.D.S. then moved for a judgment notwithstanding the verdict and Sigma moved for a judgment based on the verdict.

The trial court issued a memorandum opinion and order which sustained in part and overruled in part both motions. Appeals by both parties to this court followed.

FACTS:

E.D.S. is a corporation which is engaged in the business of designing, installing and operating computer systems for large organizations at a predetermined price. Sigma is a research and development corporation specializing in the construction of instrumentation for the aerospace industry. The subject of the patent in question and of the written agreements underlying the present action is a device about the size of cigar box which can be used to communicate directly with a computer from a remote point through a telephone. The device, for which E.D.S. holds a patent, is called a Portable Remote Terminal (P.R.T.). The concept of the specific P.R.T. with which this suit is

concerned was originated by an E.D.S. employee, Earl Spraker. This origination took place in approximately October of 1966. Spraker, over the course of the next year, constructed several working models of this P.R.T., and in October of 1967, E.D.S. and Spraker commenced preparations to apply for patent protection on the P.R.T. On March 22, 1968, a patent application covering the P.R.T. was filed with the United States Patent Office. In September of 1968, a second application for patent protection on the P.R.T. was filed with the patent office which was broader in subject matter than the first; therefore, the first application was allowed to become abandoned in favor of the second. The subject matter of the second application which was included in the first is deemed to have been filed on the earlier date.

In January of 1968, Spraker was transferred by E.D.S. from Atlanta to Dallas in order to work fulltime on the further development of this P.R.T. and its application. As soon as he arrived in Dallas, Spraker set out to locate a qualified research and development company to manufacture several prototypes of this invention. It appears that he contacted approximately 15 firms to ascertain their capabilities of meeting his demands. In his discussions with each firm, Spraker followed a uniform procedure regarding his disclosure of information concerning the P.R.T. This disclosure of information would usually be followed by a demonstration of one of the P.R.T. models he had constructed. On February 23, 1968, Spraker contacted Sigma regarding their possible manufacture of prototypes of his P.R.T. After full disclosure and demonstration of the model, Sigma expressed an interest in working with E.D.S. to develop the prototypes requested. Sigma was invited to submit a bid on construction of ten prototypes and was then selected by E.D.S. to construct these ten. It should

be noted that the invitation for bids sent by E.D.S. to Sigma provided on its first page:

> "IMPORTANT: The prospective Bidder, by receipt of the specifications and information herein contained, acknowledges that such specifications and information which may subsequently be supplied by Owner have been, or will be, disclosed to it in strictest confidence, that Owner has and shall have a proprietary interest in all such specifications and information, and the right and privilege to use, patent, manufacture, or otherwise exploit the processes, ideas and concepts described or revealed therein belong to Owner to the absolute exclusion of any such right or privilege of the prospective Bidder or any officer, director, employee, agent, assignee or successor of the prospective Bidder.
>
> "In consideration of such disclosure, the prospective Bidder, by receipt of any such specifications or information, agrees that all precautions will be taken to insure that such specifications and information will not be revealed or divulged to any third party at any time, or copies, summaries, or like material made thereof or therefrom, without the knowledge and written consent of Owner, and all such specifications, information and materials, including any copies, summaries or the like made thereof or therefrom, will be promptly returned to Owner upon demand" . . . .

After Sigma was chosen to produce the ten prototype P.R.T.'s, negotiation commenced for the purpose of drawing up a written contract covering production of the prototype P.R.T. Both E.D.S. and Sigma were represented by counsel at these negotiations. In May of 1968, E.D.S. and Sigma exe-

cuted a written agreement and title contract covering the construction and delivery of the ten P.R.T. prototypes. Part of that contract was a nondisclosure clause which stated approximately the following: Sigma agreed that it would not reveal or divulge, et cetera, any information and data furnished by E.D.S. or any other information generally produced by Sigma under the contract, without prior written consent of E.D.S., except to members of Sigma's design staff as was reasonably necessary for Sigma to perform its obligations under the contract. There was also a statement that Sigma agreed not to construct or participate in the construction of a portable terminal unit similar to the unit being produced for E.D.S., except for the sole benefit and use of E.D.S. This May 1968 agreement also included an anticompetition clause pertaining to the portable remote terminal business and the computer services business. In essence, that clause stated that Sigma would not compete with E.D.S. by constructing or participating in the construction of an alpha-nuemeric data input terminal and Sigma would not compete with E.D.S. by entering the computer services business.

Some months after this project went into operation, Sigma proposed an inexpensive version of the P.R.T. E.D.S., however, did not choose to produce the inexpensive version at that time and the matter was carried along with the project. Later on, Sigma again proposed a cheaper version of the P.R.T. However, E.D.S. again decided not to pursue production of the cheap version. In October of 1968, the ten prototypes produced by Sigma were delivered to E.D.S.

On June 2, 1970, two years after the second application for patent was filed, the United States Patent Office issued Patent No. 3,515,806, which patent is involved in this suit.

Beginning in August of 1969, Sigma commenced to market a portable audio terminal or P.A.T. Sigma leased or sold these P.A.T.'s to Computech, Inc., Republic National Bank of Dallas, Cooperative Computers of America, Inc., Source Data Automation, Inc., National Data Communications, Inc., and Ussery Industries, Inc.

Although there is no evidence to indicate that Sigma had a policy of secrecy regarding this selling and leasing of the P.A.T., E.D.S. alleges that it only discovered that Sigma was manufacturing and marketing P.A.T.'s in the summer of 1970, when it received such notification from its licensee, Chancellor Industries, who was producing the P.R.T. Therefore, in September of 1970, E.D.S. commenced a suit in state court to sequester the tools and dyes used by Sigma to produce the P.A.T. and to temporarily enjoin Sigma from continuing to use and disclose information received under the nondisclosure agreement of February 23, 1968. After a hearing in October of 1970, the state court entered an order granting a temporary injunction against further disclosure and use of information pertaining to the P.R.T. against Sigma. On the same date E.D.S. filed suit in state court it also filed suit in federal court. In the original complaint E.D.S. sought an injunction against and damages for Sigma's alleged infringement of its patent through Sigma's manufacture and sale of the P.A.T. E.D.S. also sought an injunction against and damage for Sigma's alleged breach of the February 23, 1968, nondisclosure agreement, the May 1968 prototype agreement, and the confidential relationship allegedly existing between E.D.S. and Sigma. In response to the patent claim asserted by E.D.S., Sigma denied infringement and as an affirmative defense alleged that the subject matter of the patent infringement claims were not such that were ordinarily protected by the patent laws because the ideas were not new, they were obvious to a person having ordinary skill

and computer technology, and they had been previously discovered by another person. Sigma went on to claim that all agreements it executed were the result of duress, coercion and undue influence on the part of E.D.S. towards Sigma, and that it was E.D.S., not Sigma, who first breached the May 1968 agreement.

Sigma then counterclaimed seeking actual damages of $8,228,000.00 for alleged violations of the Sherman and Clayton Acts on the part of E.D.S. These damages, alleged Sigma, resulted from E.D.S. forcing Sigma out of the portable terminal field and the computer services business by the temporary injunction issued by the state court. E.D.S. denied these allegations.

The district court, after a two week trial, submitted the case to the jury by means of 35 multipart interrogatories. The jury's answers, as was stated above, were partially favorable to Sigma and partially favorable to E.D.S. E.D.S. filed a motion for judgment notwithstanding the verdict and Sigma filed a motion for judgment based on the verdict. The trial court then sustained in part and overruled in part both motions.

REVIEW:

This court has made a thorough review of the entire proceedings in the trial court below and has further gone through a step-by-step examination of the jury's answers to the interrogatories as they relate to the evidence and testimony presented and as all of the above relates to the final judgment issued by the federal district court. We find that the only rational conclusion that can be justified by the record of this case below is that the trial court should in all respects be affirmed.

The district court did a thorough analysis of the answers submitted by the jury to the 35 multipart interrogatories. It was the conclusion of that court that the findings of the jury relating to the infringement of the patent and to the validity of the specific patent claims in question (4, 5 and 7 of the patent) were amply supported by the evidence. The conclusion of the jury, however, that E.D.S. had acted in bad faith in bringing this suit the trial court found not to be supported by substantial evidence and furthermore to be in conflict with the jury's findings that claim four mentioned above was valid. For that reason, the trial court disregarded the finding of bad faith against E.D.S. Our study of the record of the full proceedings below leave us in full agreement with the trial court. See, Stancill v. McKenzie Tank Lines, Inc. (5 Cir. 1974), 497 F.2d 529. See also, Boeing v. Shipman (5 Cir. 1959), 411 F.2d 365; Mohasco Industries, Inc. v. Barwick Mills, Inc. (5 Cir. 1965), 340 F.2d 319; Merry Manufacturing Co. v. Burns Tool Co. (5 Cir. 1965), 335 F.2d 239.

Count Two of the original complaint dealt with E.D.S.'s allegation that Sigma was in breach of the confidential relationship which existed between the two, and further dealt with E.D.S.'s allegation as to Sigma's carrying on unfair competition. The trial court noted that E.D.S. had two theories of recovery concerning Sigma's alleged violations of the contract obligations involved in the contracts of February and May, 1968. As to E.D.S.'s first theory, that of contract, the jury found that Sigma had disclosed and used for its own benefit information obtained and generated under these two agreements. The jury further found that Sigma was guilty of wilfully and maliciously using such information and should have to pay punitive damages. The jury awarded $1,000.00 for the contract breach and $7,000.00

in punitive damages. The trial court found that there was substantial evidence present to support the jury's finding of breach of the February 1968 agreement, but not of the May 1968 agreement. The trial court went on to reduce eventually the total actual damage award to $250.00, and the total of the punitive damage award against the defendants to $1,200.00, this being the amount awarded by the jury under Count Two of the complaint. As to the contract theory relating to the May 1968 agreement, the jury found that Sigma had not violated such an agreement in construction of a computer terminal unit and the trial court found such conclusion to be supported by substantial evidence and that E.D.S. should not receive any relief concerning that specific agreement. There can be no question but that the trial court was correct in all of the above actions. Stancill v. McKenzie Tank Lines, Inc., *supra;* Mohasco Industries, Inc. v. Barwick Mills, Inc., *supra;* Merry Manufacturing Co. v. Burns Tool Co., *supra.*

It appears that the jury found as to Sigma's tort theory of recovery that E.D.S. had suffered actual damage due to the willful and malicious disclosure on the part of Sigma of confidential information gained through its confidential relationship with E.D.S. The trial court was of the opinion that the jury's answers to the interrogatories were substantially supported by the evidence and furthermore that the jury's damage award mentioned above was correct. Under the tort theory the jury awarded $250.00 actual damage and $1,200.00 punitive damages.

Sigma counterclaims alleging that the restrictions contained in the May 1968 agreement between the parties constructing an alpha-numeric data input terminal or by providing that Sigma would not compete with E.D.S. while entering the computer business violate the federal antitrust

laws. The jury found, however, that the agreement not to compete with E.D.S. by entering into the computer service business imposed a greater restraint upon interstate commerce than was necessary to protect E.D.S. The jury went on to find that the defendants had suffered sufficient business or property damage to entitle them to maintain the antitrust action and awarded $410,000.00 to cover the economic injury suffered. The trial court found that although there was substantial evidence to support Sigma having standing to bring the antitrust claim, there was not substantial evidence to support an award in any amount, there being no substantial evidence to support the finding of injury and damage. This court's examination and analysis of the evidence causes us to conclude that the trial judge was well within his discretion and used sound judgment in making such a ruling. Stancill v. McKenzie Tank Lines, Inc., *supra*. See also, Mohasco Industries, Inc. v. Barwick Mills, Inc., *supra;* Merry Manufacturing Co. v. Burns Tool Co., *supra*.

The decision of the district court, the memorandum opinion and the district court's order are in all respects correct and should be

Affirmed.

APPENDIX B

OPINION AND JUDGMENT OF THE DISTRICT COURT

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. CA-3-4177-D

ELECTRONIC DATA SYSTEMS CORPORATION,

v.

SIGMA SYSTEMS CORPORATION, ET AL

MEMORANDUM OPINION

This cause proceeded to trial before a jury on Counts One and Two of the complaint of Electronic Data Systems Corporation, (EDS) plaintiff, and the counterclaim of the defendants. In Count One EDS sought recovery against defendants for patent infringement. In Count Two EDS sought recovery against the defendants for damages resulting from the disclosure and use of confidential information and unfair competition. In their counterclaim defendants sought recovery of damages for violation of federal anti-trust laws. The case was submitted to the jury by the use of special interrogatories.

EDS has filed a motion for judgment notwithstanding the verdict and defendants have filed a motion for judgment based on the verdict. After considering the motions, argument of counsel, briefs of the parties and the standard set forth in *Boeing* v. *Shipman*, 411 F.2d 365 (5th Cir. 1969), to be used in testing the sufficiency of the evidence to support a verdict of a jury, the court is of the opinion that both motions should be sustained in part and overruled in part.

COUNT ONE — PATENT INFRINGEMENT

The first set of interrogatories (Questions 1 to 15) inquired into the validity of claims four, five and seven of a patent for a portable remote data terminal (PRT) owned by EDS and whether these claims had been infringed by the conduct of the defendants.

The jury found that the defendants had not infringed these claims (Question 1) and that claims five and seven were not valid (Question 5 to 14). The jury also found that EDS acted in bad faith in prosecuting this suit for infringement of this patent (Question 15).

This court is of the opinion that the findings of the jury relating to infringement of the patent and to the validity of claim four, five and seven of the patent are all supported by the evidence, but the finding that EDS acted in bad faith in bringing this suit is not supported by substantial evidence and is in conflict with the jury findings that claim four is valid and such finding of bad faith should be disregarded. Accordingly, paragraphs 1-15 of EDS's motion for judgment notwithstanding the verdict should be overruled and paragraphs 16-20 should be sustained, and judgment will be entered that claim four of the patent is valid, that claims five and seven of the patent are invalid, that defendants have not infringed the patent and that defendants are not entitled to any relief in connection with the defense of Count One of EDS's complaint.

COUNT TWO — CONFIDENTIAL RELATIONSHIP AND UNFAIR COMPETITION

EDS sought to recover damages from the disclosure and use by defendants of confidential information regarding the portable remote data terminal (PRT) covered by the patent and for defendants' violation of an agreement not

to compete with EDS by constructing and selling an alpha-numeric data input terminal.

A. Contract Theory of Recovery

One of EDS's theories of recovery concerned defendants' alleged violations of obligations contained in agreements dated February and May, 1968, not to disclose or use information furnished or generated under these agreements regarding the PRT. The jury found that defendants disclosed and used for their own benefit information obtained and generated under these two agreements (Question 16). However, the only actual injury that EDS was found to have suffered was $1000 and this was from the use by defendants of information generated under the May agreement (Question 17d). The jury also found that the use by defendants of information generated under the May agreement was willful and malicious (Question 18d) and assessed punitive damages in varing amounts totaling $7000 against the defendants.

By way of defense, the defendants urged and the jury found that the information regarding the PRT was publicly known (Question 21), that EDS failed to comply with the May agreement (Question 30), and that this agreement was executed by the defendants as a result of duress, economic coercion or undue influence (Question 31).

The court is of the opinion that the above jury findings are supported by substantial evidence except for the finding that EDS failed to comply with the May agreement (Question 30).

EDS also sought recovery of damages for the defendants' violation of the provisions of May, 1968 agreement whereby defendants agreed not to compete with EDS in the construction of an alpha-numeric data input terminal without

the consent of EDS. However, the jury found that defendants did not compete with EDS in the construction of such a unit (Questions 26 and 28). The court is of the opinion that these answers are supported by substantial evidence and EDS is not entitled to relief under this theory of recovery.

B. Tort Theory of Recovery

Aside from the confidential relationship created by the February and May, 1968 agreements, the jury found that the defendants disclosed to others information not publicly known obtained from EDS without its consent (Question 22b) and that the disclosure was willful and malicious (Question 24). The jury also found that as a result of these acts EDS suffered actual damages of $250 (Question 23) and punitive damages of $1200 (Question 25). Based on these findings EDS seeks recovery because of defendants' tortuous violation of its confidential relationship with EDS. This court is of the opinion that these answers find substantial support in the evidence.

Accordingly, paragraphs 21-27 and 30-32 of EDS's motion for judgment notwithstanding the verdict should be overruled and paragraphs 28 and 29 should be sustained, and judgment will be entered in favor of EDS for their damages in the sum of $1450 under their tort theory of recovery.

COUNTERCLAIM — ANTITRUST VIOLATIONS

The agreement of May, 1968 between the parties for the construction by defendants of ten prototype units of the PRT provided that the defendants would not compete with EDS (a) by constructing an alpha-numeric data input terminal or (b) by entering the computer services business. Defendants urged in their counterclaim that these restrictions violate the federal antitrust laws. EDS urged that the de-

fendants did not have capacity or standing to bring an antitrust claim.

The jury found that the agreement not to compete with EDS by entering the computer services business imposed a greater restraint upon interstate commerce than was necessary to protect EDS (Question 33b), that the defendants had sufficient business or property to entitle them to maintain this antitrust claim (Question 36a), and that defendants were caused to suffer economic injury to such business or property in the amount of $410,000. (Questions 34b and 35).

The court is of the opinion that the findings of the jury that defendants had standing to bring this antitrust claim (Question 36) and suffered injury and damages to their business or property by reason of the agreement not to enter the computer services business (Questions 34b and 35) are not supported by substantial evidence. Accordingly, paragraphs 33a, c, d, e, h, and i, and 34a, c, d, and e of EDS's motion for judgment notwithstanding the verdict should be overruled and paragraphs 33b, f and g and 34f and g should be sustained, and judgment will be entered denying defendants recovery against EDS on their counterclaim.

By separate instrument this court has prepared a judgment appropriate with the above findings and conclusions and it has been entered of even date herewith.

Dated this 11th day of January, 1973.

s/ Robert M. Hill
United States District Judge

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. CA-3-4177-D

ELECTRONIC DATA SYSTEMS CORPORATION

v.

SIGMA SYSTEMS CORPORATION, ET AL

ORDER

The Court's Memorandum Opinion dated January 11, 1973 is hereby amended to reflect that paragraph 34b of Electronic Data Systems Corporation's motion for judgment notwithstanding the verdict should be sustained.

It is so ORDERED.

Dated this 17th day of January, 1973.

s/ ROBERT M. HILL
United States District Judge

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. CA-3-4177-D

ELECTRONIC DATA SYSTEMS CORPORATION

v.

SIGMA SYSTEMS CORPORATION, ET AL

JUDGMENT

This action came on for trial before the court and a jury, the Honorable Robert M. Hill, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict on special interrogatories, and Electronic Data Systems Corporation, plaintiff, having moved for judgment notwithstanding the verdict, the court is of the opinion that such motion should be granted in part and overruled in part for the reasons set forth in this court's Memorandum Opinion.

It is, therefore, ORDERED and ADJUDGED as follows:

COUNT ONE — PATENT INFRINGEMENT

1. That United States Letters Patent No. 3,515,806 was issued to Electronic Data Systems Corporation as assignee on June 2, 1970, on the application of Earl Spraker, filed September 16, 1968.

2. That Electronic Data Systems Corporation is the sole and exclusive owner of United States Patent No. 3,515,806.

3. That claim 4 of said patent is valid in law and enforceable.

4. That claims 5 and 7 of said patent are invalid in law and enforceable.

5. That Electronic Data Systems take nothing against Sigma Systems Corporation, Applied Science, Incorporated, C. L. Habern and R. E. Morgan, jointly or severally, under Count One of Plaintiff's First Amended Complaint.

COUNT TWO — CONFIDENTIAL RELATIONSHIP AND UNFAIR COMPETITION

6. That Electronic Data Systems shall recover of and from Sigma Systems Corporation, Applied Science, Incorporated, C. L. Habern and R. E. Morgan, jointly and severally, actual damages in the sum of $250.00 and punitive damages as follows:

(a) Sigma Systems Corporation — $500.00

(b) Applied Science, Incorporated — $500.00

(c) C. L. Habern — $100.00

(d) R. E. Morgan — $100.00

The above sums shall bear interest at a rate of 6% from the date of this judgment.

7. That Electronic Data Systems Corporation is the sole and exclusive owner of the master container and four molds or dies, purchased by Sigma Systems Corporation from Razorback Plastics for use in constructing the ten prototypes of the portable remote terminal under the written prototype agreement of May of 1968 and presently in the custody of the sheriff of Dallas County, Texas, pursuant to orders of the 95th Judicial District Court of Dallas County, Texas, in Cause No. 70-10038-D, and that Electronic Data Systems Corporation is entitled to the possession thereof.

COUNTERCLAIM — ANTITRUST VIOLATIONS

8. That the counterclaim of Sigma Systems Corporation, Applied Science, Incorporated, C. L. Habern and R. E. Morgan against Electronic Data Systems Corporation and Chancellor Industries, Incorporated, be dismissed on the merits.

COSTS

9. That all costs are taxed against Sigma Systems Corporation, Applied Science, Incorporated, C. L. Habern and R. E. Morgan, jointly and severally.

Dated this 11th day of January, 1973.

s/ Robert M. Hill
United States District Judge

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. CA-3-4177-D

ELECTRONIC DATA SYSTEMS CORPORATION,

Plaintiff

v.

SIGMA SYSTEMS CORPORATION, ET AL.,

Defendants

ORDER AMENDING JUDGMENT

The Motion to Alter or Amend Judgment under Rule 59(e) of the Federal Rules of Civil Procedure filed by Defendants came on for hearing before the court, Honorable Robert M. Hill, United States District Judge.

The court is of the opinion that the motion should be granted and paragraph 4 of the Judgment dated January 11, 1973, is hereby amended to read as follows:

> "4. That claims 5 and 7 of said patent are invalid in law and unenforceable."

It is so ORDERED.

Dated this 22nd day of January, 1973.

s/ ROBERT M. HILL
United States District Judge

FILED
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MICHAEL RODAK, JR., CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-429

SIGMA SYSTEMS CORPORATION,
APPLIED SCIENCE INCORPORATED,
C. L. HABERN AND R. E. MORGAN,
v.
Petitioners,

ELECTRONIC DATA SYSTEMS CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR ELECTRONIC DATA SYSTEMS CORPORATION IN OPPOSITION

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C. L. HABERN AND R. E. MORGAN,
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v.

ELECTRONIC DATA SYSTEMS CORPORATION,
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR ELECTRONIC DATA SYSTEMS CORPORATION IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the District Court (App. A, page A-11, of the Petition) was not reported. The opinion of the Court of Appeals for the Fifth Circuit (App. A, page A-1, of the Petition) is reported at 500 F. 2d 241.

JURISDICTION

The judgment of the Court of Appeals was entered on August 30, 1974. The petition for writ of certiorari was filed on October 15, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(l).

QUESTION PRESENTED

Whether the findings of the District Court and the Court of Appeals that the evidence was insufficient to support the jury's verdict on several essential elements of petitioners' antitrust counterclaim are correct?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent Constitutional provision (U.S. Const. Amend. VII) and statutory provisions (15 U.S.C. §§ 1, 15) are set forth in the Petition at pages 2-3.

STATEMENT

Defendants Sigma Systems Corporation ("Sigma"), Applied Science Incorporated ("Applied"), C. L. Habern ("Habern") and R. E. Morgan ("Morgan"), petitioners here, seek a third review of the sufficiency of the evidence claimed to support certain findings with respect to the antitrust counterclaim asserted against plaintiff Electronic Data Systems Corporation ("EDS"), respondent here.

1. Nature of the Case.

This suit was brought by EDS for injunctive relief and to recover damages for Defendants' (a) infringement of United States Patent No. 3,515,806 and (b) breach of (i) the written nondisclosure agreement of February 23, 1968, (ii) the written prototype agreements of May 1968 and (iii) Defendants' confidential relationship with EDS.

Alleging violations of the Sherman and Clayton Acts on the part of EDS, Defendants filed a counterclaim with respect

to certain provisions in the prototype agreements of May 1968 which prohibited them from competing with EDS in (a) the portable terminal business and (b) the computer services business.

EDS moved for a directed verdict as to the counterclaim of Defendants at the close of their evidence and again at the close of all the evidence. Both motions were taken under advisement by the District Court and the case was submitted to the jury on special interrogatories. The jury's answers to the interrogatories submitted were partially favorable to EDS and partially favorable to Defendants. EDS moved for judgment notwithstanding the verdict.

Briefs in support of and opposing the motion for judgment n.o.v. were submitted to the District Court which, after some five months of consideration, granted such motion as to Defendants' antitrust counterclaim. Consequently, Judgment was entered by the District Court (a) exonerating Defendants of infringing the Patent, (b) invalidating two of three claims of the Patent, (c) awarding actual and punitive damages to EDS for Defendants' malicious breach of their confidential relationship with EDS, and (d) dismissing with prejudice the counterclaim of Defendants.

Defendants filed a notice of appeal from the Judgment, and EDS thereafter filed a notice of cross-appeal. The Court of Appeals affirmed the Judgment of the District Court in all respects.

2. The Antitrust Counterclaim.

In their antitrust counterclaim Defendants sought actual

damages of $8,228,000 for alleged violations of the Sherman and Clayton Acts on the part of EDS (R 47).[1] According to their pleadings, the damages resulted from Defendants being forced out of (a) the portable terminal field[2] and (b) the computer services business[3] by a temporary injunction issued by a Texas State Court at the instance of EDS (R 45-47).

In reply to the counterclaim, EDS denied having violated the Sherman and Clayton Acts and having caused Defendants to suffer any damages (R 49). EDS also affirmatively alleged that Defendants' lacked standing, that is, sufficient "business or property" under Section 4 of the Clayton Act, 15 U.S.C. § 15, to maintain the antitrust counterclaim (R 49).

3. Antitrust Findings.

After two weeks of testimony, the District Court submitted the case to a jury on special interrogatories. As regards Defendants' antitrust counterclaim, the jury found that the covenant prohibiting Defendants from competing with EDS in the portable terminal business was reasonable, and that Defendants lacked the requisite "business or property" to assert an antitrust claim based thereon (R 158, 160).

---

[1] Citations to the printed Appendix in the Court of Appeals will be indicated by an "R" followed by the page numbers to which reference is made. Plaintiff's exhibits will be designated by the letter "P" and Defendants' exhibits by the letter "D," followed by the specific exhibit number and a citation to the page of the exhibit volume of the Appendix where the exhibit appears.

Unless otherwise indicated, all emphases are supplied by counsel.

[2] Portable terminals are "hardware" — "those things that you can touch, the actual hard equipment" (R 188).

[3] "The field of computer services generally defines an organization or a company that is established to provide those services that are required to define, design, program, implement and operate computers in the solution of problems" (R 346).

The jury found that the contractual restraint against Defendants competing with EDS in the computer services business was unreasonable, and that the restraint caused economic injury to Defendants (R 158, 159). The jury returned findings that Applied and Sigma were damaged in the sum of $200,000 each, and Habern and Morgan in the sum of $5,000 each (R 159). As regards the computer services business, the jury found Defendants to have had the requisite "business or property" (R 160).

4. Judgment Notwithstanding the Verdict.

Subsequently, EDS filed a motion for judgment notwithstanding the verdict (R 162-72). Granting the motion with respect to Defendants' computer services counterclaim, the District Court concluded:

> "The jury found that the agreement not to compete with EDS by entering the computer services business imposed a greater restraint upon interstate commerce than was necessary to protect EDS (Question 33b), that the defendants had sufficient business or property to entitle them to maintain this antitrust claim (Question 36a) and that defendants were caused to suffer economic injury to such business or property in the amount of $410,000 (Questions 34b and 35).
>
> *"The court is of the opinion that the findings of the jury that defendants had standing to bring this antitrust claim (Question 36) and suffered injury and damages to their business or property by reason of the agreement not to enter the computer services business (Questions 34b and 35) are not supported by substantial evidence"* (App. A-15; R 180-81).

Thus, because of a lack of evidence to support the existence of (a) injury, (b) causal connection, (c) amount of damages,

and (d) standing as regards the "computer services" claim, the District Court dismissed Defendants' antitrust counterclaim (App. A-19; R 184).

5. The Appeal.

The Court of Appeals was presented 200 pages of briefs on appeal, a large portion of which was directed to the question now before this Court. Its consideration of petitioners' appeal specifically included "a thorough review of the entire proceedings" and "a step-by-step examination of the jury's answers to the interrogatories as they related to the evidence" (App. A-7). Finally, after having the case under advisement for some six months, the Court of Appeals rendered its decision. With respect to the District Court's dismissal of the computer services counterclaim for lack of evidence, the Court of Appeals held:

> "This court's examination and analysis of the evidence causes us to conclude that the trial judge was well within his discretion and used sound judgment in making such a ruling" (App. A-10).

Consequently, the Court of Appeals concluded that "[t]he decision of the district court, the memorandum opinion and the district court's order are in all respects correct" (App. A-10).

ARGUMENT

I.

The Decision Below is Clearly Correct

After hearing the testimony during a two weeks trial of this case, and a searching examination of the record in

considering EDS's motion for judgment n.o.v., the District Court concluded that the evidence was lacking in support of several elements of Defendants' computer services counterclaim — any *one* of which would defeat recovery.

A close scrutiny of the record by the Court of Appeals — which included "a thorough review of the entire proceedings" and "a step-by-step examination of the jury's answers to the interrogatories as they relate to the evidence" (App. A-7) — resulted in an across-the-board affirmance of the District Court (App. A-10). The evidence in the present case demonstrates the decision below is clearly correct.

A. No Evidence Defendants Had the Requisite "Business or Property"

Section 4 of the Clayton Act authorizes the recovery of treble damages only when a person is injured in his "business or property" as a result of a violation of the federal antitrust laws. *E.g., Stearns v. Tinker & Rasor,* 252 F. 2d 589 (9th Cir. 1957); *Triangle Conduit & Cable Co. v. Nat'l Electric Prod. Corp.,* 152 F. 2d 398 (3d Cir. 1945). Although they clearly had the burden of proof on this point, Defendants completely failed to adduce any evidence which supported their standing with respect to the computer services business. To the contrary, the evidence conclusively shows that Defendants were not in the computer services business, did not intend to engage in it and did not have personnel or finances sufficient to enter the field. In short, the Defendants lacked the requisite standing.

Indeed, the Defendants admitted that they had never been and were not engaged in the computer services business (R 349, 510-11, 732). According to its President, Sigma was

"engaged primarily in building instrumentation for the aerospace industry" (R 731). Applied, on the other hand, "was not an operating company" — it simply owned all of the stock of Sigma (R 783). Consequently, when Defendant Morgan was asked:

> "Q To your knowledge, did any of the Defendants in this lawsuit engage in the computer services business?"

he replied:

> "A Not to my knowledge" (R 511).

The testimony of Morgan in this respect was fully corroborated by the President of Sigma (R 732) and other witnesses (R 348-49, 459).

Even if a claimant under the federal antitrust laws has not suffered injury to an existing business, he may nevertheless have standing to maintain an action if he had the necessary intent and preparedness to enter the field. *E.g., Martin v. Phillips Petroleum Co.*, 365 F. 2d 629, 633 (5th Cir.), *cert. denied*, 385 U.S. 991 (1966); *Triangle Conduit & Cable Co. v. National Electric Prod. Corp.*, 152 F. 2d 398 (3d Cir. 1945). In the present case, however, the Defendants had *neither* the intent *nor* the preparedness to enter the computer services field.

The record is barren of any evidence that Defendants ever made any preparations or had the capability to enter the computer services business. The testimony of the President of Sigma on this point is most relevant:

> "Q Now, at any time that you were connected with Sigma Systems, was Sigma or Applied Science ever equipped to enter into the computer services business?

"A No.

"Q Either from the standpoint of personnel or equipment?

"A No" (R 733).

Establishing beyond doubt that Sigma did not have sufficient financial resources to enter the computer services business, the Comptroller of Sigma stated:

"Q Did Sigma have the financial stamina to go into the computer services business in your opinion?

"A At that time the cash was not available to do it" (R 771).

The evidence is also conclusive that the Defendants never took any affirmative steps to engage in the computer services business. When Morgan, Vice President of Sigma, was asked:

"Q Were any preparations ever made at Sigma to go into that business [*i.e.*, the computer services business]?"

he responded:

"A Not that I am aware of" (R 511).

Moreover, the President of Sigma admitted that Defendants never intended to go into the computer services business:

"Q At any time that you were connected with Sigma, do you know of anyone at Sigma or Applied Science who expressed an intention to enter into the computer services business?

"A I do not recall anybody suggesting that we go into the computer services business" (R 733).

This testimony was verified by Morgan (R 504-05) and other witnesses (R 349, 459).

Final and conclusive confirmation that Defendants never

intended to enter the computer services business came from counsel for Defendants:

> "MR. JAMES [*i.e.*, counsel for Defendants]: Your Honor, we object to this line of questioning as being no — having no absolutely, no relevancy. *The witness testified he knows of no instance where Sigma attempted to go into the computer services business, and it has absolutely no bearing on this case. We don't claim we went into it; they don't claim we went into it; there could be no question —*" (R 461).

As counsel for Defendants aptly noted, "there could be no question." The conclusion is inescapable that Defendants never had any intent or plans to enter the computer services business.[4]

B. No Evidence of Causal Connection or Injury to Defendants in the Computer Services Business

A thorough review of the record in this case reveals a complete absence of any evidence that Defendants were caused any injury by the covenants not to compete with EDS in the computer services business. The record is devoid of any evidence that the Defendants were deprived of any

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[4] In addition to the reasons advanced above, Applied, Habern and Morgan, as the shareholder and officers, respectively, of Sigma, lack standing to sue under Section 4 of the Clayton Act. Applicable here is the rule of remoteness that "shareholders, officers and creditors of corporations, suing for diminution in value of ownership, loss of earnings or impairment of corporate ability to pay, caused by the impact of antitrust conduct on the corporation" lack standing to sue. Waldron v. British Petroleum Co., 231 F. Supp. 72, 85 (S.D. N.Y. 1964), citing several cases including Martens v. Barrett, 245 F. 2d 844 (5th Cir. 1957), and Bookout v. Schine Chain Theatres, Inc., 253 F. 2d 292 (2d Cir. 1958).

As previously mentioned, Applied is a non-operating company which, as the parent of Sigma, guaranteed performance by Sigma under the prototype agreement of May 1968 (P-38, R 61-62). Applied is merely

contracts or revenues in the computer services field. The total lack of evidence on this point is hardly surprising since the record conclusively shows that Defendant conceded they were not engaged in and did not have either the plans or preparedness to engage in the computer services business. As a result, nowhere in the record does the jury's finding that Defendants were caused injury in the computer services business find any support.

C. No Evidence as to Amount of Damages Purportedly Suffered by Defendants in Computer Services Business

The record discloses not only no proof of the fact of damage, but also no basis whatsoever for the jury to infer the *amount* of damages. In the absence of any probative evidence on the fact of damage to any person covered by Section 4 of the Clayton Act, there is no question of fact as to the amount of damages for the jury to decide. "[T]he fact of injury must first be shown before the jury is allowed to estimate the amount of damages." *Flintkote Co. v. Lysfjord*, 246 F. 2d 368, 392 (9th Cir. 1957).

There is no evidence of any "lost net profits" of Sigma from computer services for the obvious reason that it neither engaged nor intended to engage in the computer services

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the sole *shareholder* of Sigma and as such lacks standing to sue for any "injury" to Sigma (R 282, 726, 782-83). Defendants Habern and Morgan were *officers* who signed individual prototype agreements in the course of their employment duties for Sigma and as such also lack standing to sue for any "injury" to Sigma. As of the time of the filing of the counterclaim, Habern was still an officer of Sigma and thus had no individual claim (R 555-56, 782, 826). Morgan did not leave Sigma until three days before this litigation commenced and thus could never have been personally "injured" in his "business or property" (R 546).

business. Moreover, no attempt was made to show net profits of a comparable going concern in the computer services field. Instead, the record demonstrates that Sigma never earned a profit in its own field of high technology, electronic products (R 784-85). Indeed, by the summer of 1970 Sigma's losses exceeded $400,000 (R 785). Significantly, both the President and Comptroller testified that Sigma was "insolvent" throughout the period of their association with the company (R 746-47, 768).

Notwithstanding this undisputed proof, the jury found that Sigma was damaged in the amount of $200,000 by the covenant not to compete with EDS in the computer services field. Where Sigma suffered losses in the electronic products area, lacked capital in its own business, made no attempt to enter the computer services field and offered no comparison of companies in the computer services business in competition with EDS, no reasonable man could have arrived at damages of $200,000. It is nothing short of ludicrous for the jury to have awarded an additional $200,000 to Applied — "a non-operating entity" which is merely a shareholder of Sigma (R 282, 782-83). The jury further compounded its error by awarding $5,000 to Morgan, presumably based on the amount of wages owed him by Sigma at the time he left — which coincided with the filing of the present suit (R 500, 542). Just as it did in assigning the same amount to Applied as to Sigma, the jury gave Habern the same $5,000 recovery as Morgan. On the basis of the present record, the District Court and Court of Appeals quite properly disregarded the damage findings.

II.

There is No Important Question of Federal Law

The sole question in this case turns on the sufficiency of the evidence to support certain essential elements of petitioners' counterclaim pertaining to the computer services business. The District Court and the Court of Appeals concluded that the evidence was lacking. Petitioners insist, however, that implicit in these evidentiary evaluations lurk "common, significant and undecided issues under the federal antitrust laws" (Petition, p. 7). Indeed, according to petitioners, this case offers "a uniquely favorable opportunity" for this Court to issue a statement of "the principles applicable to private antitrust actions based on unreasonable covenants not to compete" (Petition, pp. 11, 14). Finally, in an effort to embellish this invitation, petitioners go so far as to suggest that "the decisions below threaten the effectiveness of the private remedy for enforcing the antitrust laws" (Petition, p. 11).

Despite petitioners' entreaties, the question of whether "a contract containing an unreasonable covenant not to compete violates Section 1 of the Sherman Act" is never reached (Petition, p. 11). Indeed, the decisions of the District Court and Court of Appeals did not even address the finding of the jury that the computer services covenant was an unreasonable restraint of commerce.

The short answer to petitioners' contentions is that the correctness of the decision below rests solely on an examination and analysis of the evidence in the present case. It has not

been the practice of this Court to grant a certiorari to review evidence and discuss specific facts. *United States v. Johnston*, 268 U.S. 220, 227 (1925). No important question of federal law is present here.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petiton for writ of certiorari should be denied.

Respectfully submitted,

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